

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF PETITION NO.)
96018-76H TO THE DEPARTMENT OF) PROPOSAL
NATURAL RESOURCES AND) FOR
CONSERVATION FOR DESIGNATION) DECISION
OF A CONTROLLED GROUNDWATER)
AREA IN THE HAYES CREEK BASIN)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act a hearing was conducted on August 10, 1998, to determine whether the area designated as a temporary controlled groundwater area by the Final Order issued August 6, 1996, should be designated a permanently controlled groundwater area.

APPEARANCES

Proponents of the permanent designation of the controlled groundwater area were represented at the hearing by and through counsel, David Pengelly.

None of the persons attending had opposition to designating the area a permanently controlled groundwater area.

Wherefore, based upon the record in this matter, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. A petition was filed with the Department on November 9, 1995. The petition alleged groundwater withdrawals were in excess of recharge to the aquifer or aquifers within the proposed groundwater area. The petition also alleged groundwater levels or pressures in the area were declining or have declined excessively. Further the petition alleged excessive groundwater withdrawals are likely to occur in the near future because of consistent and significant increases in withdrawals from within the groundwater area. On August 6, 1996, the Department issued a Final Order designating the area a temporary controlled groundwater area effective for two years. During the two-year period, the Department conducted a study to determine the need for a permanent controlled groundwater area. The results of the study were submitted to the Hearing Examiner with recommended actions from the Department and area residents. As required by

the Final Order issued August 6, 1996, the Department held a public hearing August 10, 1998, to determine whether the area should be designated a permanent controlled groundwater area.

2. A Notice to Groundwater Users was published in the *Missoulian* on July 8, 1998, setting forth the description of legal subdivisions of all lands proposed to be included in the controlled groundwater area and the time, place, and purpose of the hearing. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed controlled groundwater area. The Notice also stated any interested person could appear, either in person or by attorney; file written objections to the granting of the proposal; and be fully heard. (Department file.)

2. A study was conducted by the Department of Natural Resources and Conservation after the hearing in 1996 through May, 1998. University of Montana graduate student, Dana S. Bayuk, conducted a detailed study of groundwater conditions in the Woodlands Heights and Woodland Park subdivisions during 1985 and 1986, collecting an impressive amount of information concerning the geology of the area. The hydrogeology, groundwater budget, and observed reaction of the bedrock aquifer was reevaluated and new groundwater level data collected in 1996 and 1997 were used in the Department's report. (*Groundwater Conditions at the Hayes Creek Temporary Controlled Groundwater Area* at Abstract.)

The recommended actions as a result of the study were: designate the Hayes Creek basin a permanently controlled groundwater area; limit the density of new wells; limit use when necessary; test for nitrates; monitor selected wells each spring and summer; and elect a groundwater commissioner for administration and enforcement purposes.¹ (*Recommended Actions* as developed by the Department and area residents.)

3. Any proposed use or well will most likely impair or substantially interfere with existing rights to appropriate groundwater. The existing groundwater users within the subdivisions in the Hayes Creek watershed have been experiencing groundwater shortages for a number of years. (Department file Petition No. 96018-76H and Petition No. 91260-76H.)

4. Groundwater levels or pressures in the area in question appear to be declining or have declined excessively. The

¹ The term, groundwater commissioner, was mistakenly used when *Recommended Actions* was written. The Department has no authority to direct the subdivision property owners to elect a water commissioner. The Department does have authority to appoint groundwater supervisors in a controlled ground water area.

existing groundwater users within the subdivisions in the Hayes Creek watershed have been experiencing groundwater shortages for a number of years. In 1983 domestic wells began to go dry and a number of wells had to be deepened within the subdivision area. (Department file Petition No. 96018-76H and Petition No. 91260-76H.)

5. Excessive groundwater withdrawals are likely to occur in the near future because of consistent and significant increases in withdrawals from within the groundwater area. Due to the close proximity of this area to the city of Missoula which has been experiencing rapid growth, this is a prime area for future development which could easily lead to additional excessive groundwater withdrawals with zoning changes. (Department file Petition No. 96018-76H)

Therefore, based on the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and over the subject matter. Mont. Code Ann. §§ 85-2-113, 85-2-506 (1997).
2. The Department gave proper notice of the hearing and all substantive procedural requirements of law or rule have been fulfilled. See Findings of Fact 1 and 2.
3. There is sufficient evidence to designate the temporarily closed groundwater area a permanently controlled groundwater area. See Findings of Fact 2 and 3.

Based on the foregoing Findings of Fact and Conclusions of Law, The Hearing Examiner makes the following:

PROPOSED ORDER

Effective on the date of the Department's Final Order, a permanent controlled groundwater area is established for both the shallow alluvial and the deep fractured bedrock aquifers under approximately 2,465 acres in the Hayes Creek drainage basin, generally described as follows:

SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$	SECTION 3;
S $\frac{1}{2}$ S $\frac{1}{2}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, and S $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{4}$	SECTION 4;
S $\frac{1}{2}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, and W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$	SECTION 5;
S $\frac{1}{2}$, S $\frac{1}{2}$ N $\frac{1}{2}$, S $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$	SECTION 6;
N $\frac{1}{2}$, N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$	SECTION 7;
N $\frac{1}{2}$ SE $\frac{1}{4}$, N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$	SECTION 7;
N $\frac{1}{2}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$	SECTION 8;
N $\frac{1}{2}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$	SECTION 9;

N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$

SECTION 10

all in Township 12 North, Range 20 West; excluding the area of the permanently controlled groundwater area.

The existing permanently controlled groundwater area is located in: NE $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 12 North, Range 20 West, Missoula County, Montana.

A. A person may appropriate groundwater in a controlled groundwater area only by applying for and receiving a permit from the Department before drilling a well. The Department may not grant a permit if the withdrawal would be beyond the capacity of the aquifers in the groundwater area to yield groundwater within a reasonable or feasible lift. Mont. Code Ann. § 85-2-508 (1997).

B. There shall be no more than one well on each lot with lot sizes limited to current local zoning regulations. Replacement wells may be installed, provided the older well is abandoned in accordance with Mont. Admin. R. 36.21.670 (1997).

C. New groundwater permits in the controlled groundwater area shall include a condition that groundwater withdrawals may be limited in the future.

D. Static water levels shall be measured monthly during the spring and summer of each year. Written records must be kept and those records shall be submitted to the Department by November 30 of each year. The Department will select certain wells in the area which would provide a reasonable measure of groundwater levels in different parts of the subdivisions and the surrounding area.

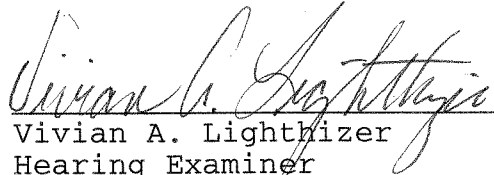
E. The Department shall, in cooperation with the property owners in the controlled groundwater area, select a groundwater supervisor who would be responsible for monitoring groundwater levels, taking groundwater samples, and administering water in accordance with any suggested water use restrictions based upon current or anticipated low static water levels. The groundwater supervisor could require metering of groundwater withdrawals, optionally for irrigation purposes only, if it is deemed necessary to administer groundwater use limitations. The groundwater supervisor would have the authority to request assistance from the Department in enforcing the final order, including the impositions of fines and other civil penalties authorized under Mont. Code Ann. § 85-1-114 and 122 (1997).

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party

adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

Dated this 7th day of October, 1998.


Vivian A. Lighthizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

MEMORANDUM

One of the recommended actions is not included in the Proposal For Decision. Item four of the *Recommended Actions* deals with water quality. While it is a grave concern because the subdivision drainfield is located in the upper end of the subdivision and there is a potential for pollutants to accumulate in the fractured bedrock aquifer under the subdivision, improperly installed septic systems and groundwater contamination are outside the jurisdiction of this Department. The Department urges the residents in the area to conduct regular sampling and analysis of a few groundwater wells to determine if a problem exists.

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was served upon all parties listed below this 7th day of October, 1998, as follows:

Steven F. McCool
7215 Beryl Ln.
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Lauren and John Knudsen
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Marjorie Hickey
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Missoula, MT 59801

Kerry Dewey
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A handwritten signature in black ink, appearing to read 'M Shulund', written over a horizontal line.

Mandi Shulund
Hearings Unit Assistant

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OF A CONTROLLED GROUNDWATER) ORDER
AREA IN THE HAYES CREEK BASIN)

* * * * *

A Proposal for Decision (Proposal) in the above-entitled matter was issued October 7, 1998. Copies of the Proposal were mailed to all interested parties. The Proposal recommended designation of a controlled groundwater area in the area delineated in the petition.

The Director of the Department of Natural Resources and Conservation, having given the matter full consideration, hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 7, 1998, Proposal and incorporates them herein by reference.

THEREFORE, based upon the record herein, the Director makes the following:

ORDER

Effective on the service date of this Final Order, a permanent controlled groundwater area is established for both the shallow alluvial and the deep fractured bedrock aquifers under approximately 2,465 acres in the Hayes Creek drainage basin, generally described as follows:

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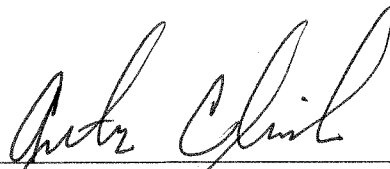
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NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order. If a petition for judicial review is filed, the Department will transmit a copy of the tape(s) of the oral proceedings to the district court. If a party to the proceeding elects to have a written transcription prepared, that party may purchase the tapes and have a transcript prepared.

Dated this 30th day of November, 1998.

A handwritten signature in cursive script, appearing to read "Arthur Clinch", written over a horizontal line.

Arthur Clinch, Director
Department of Natural Resources
and Conservation
1625 Eleventh Avenue
Helena, Montana 59620
(406) 444-2074

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Final Order was served upon all parties on the attached lists this 4th day of December, 1998.

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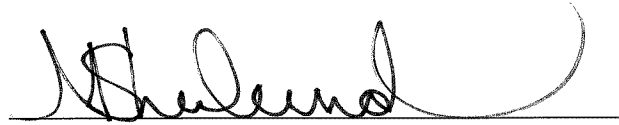
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Mandi Shulund
Hearings Unit Assistant